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No. 78-1496

IN THE

Supreme Court of the United States

October Term, 1978

LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

HARRIS A. PARSON, KAISER ALUMINUM & CHEMICAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HARRIS A. PARSON, KAISER ALUMINUM & CHEMICAL CORPORATION,

Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local 13000, United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, enabling this Court to review the Fifth Circuit's judgment in *Parson v. Kaiser Aluminum and Chemical Corporation, and Local 13000, United Steelworkers of America, AFL-CIO-CLC*, 575 F.2d 1374 (5th Cir. 1978), as amplified on denial of rehearing, 583 F.2d 132 (5th Cir. 1978).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is not officially reported, but is reprinted as App. A to this petition. The judgment of the

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[1] Although nominally a respondent herein, Kaiser Aluminum & Chemical Corporation was a co-defendant with petitioner in the district court, and a co-appellee in the Court of Appeals.

district court is reprinted as App. B to this petition. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 575 F.2d 1374, and is reprinted as App. C to this petition. The order of the Court of Appeals denying rehearing, and the opinion accompanying that order, are reported at 583 F.2d 132, and are reprinted as App. D to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit were issued on July 10, 1978 (App. C). Timely petitions for rehearing were denied on November 1, 1978 (App. D). On January 22, 1979, Justice Powell signed an order extending the time for filing a petition for writ of certiorari to and including March 31, 1979 (App. E). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Section 703(h) of Title VII of the Civil Rights Act of 1964 immunize provisions of a seniority system that define which employees are eligible to compete for particular vacancies, when those provisions are applied equally to blacks and whites and were not instituted or maintained for a discriminatory purpose?

If the answer to Question 1 is no, then:

2. Did the court below apply an erroneous standard in holding that a seniority system installed years before the enactment of Title VII, which allocates jobs on the basis of length of plant service but which gives a priority to permanent employees within the department where a vacancy occurs, unlawfully perpetuates pre-1956 initial assignment discrimination.

3. Consistent with *Machinists* v. *Labor Board*, 362 U.S. 411 (1960) and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), can a current, otherwise lawful employment practice be converted into a violation of Title VII solely because of discrimination which was committed by the em-

ployer prior to 1956 (i.e., nearly a decade before the effective date of Title VII) and which is therefore not directly actionable.

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), provides, in pertinent part, as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> • • •
>
> (3) to cause or attempt to cause an employer to discriminate against any individual in violation of this section.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides, in pertinent part, as follows:

> (h) Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Introduction

This is an action brought by two black employees on behalf of themselves and a class of similarly situated black employees, alleging that their employer and union violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, in numerous respects, only one of which is of concern here: the maintenance of a provision granting priority in bidding for vacant jobs within a department to the employees already working in that department over employees working in other departments.

The district court granted judgment in favor of the defendants on all issues at the close of the plaintiffs' case at trial. On appeal, the court of appeals reversed the decision of the district court in four respects, only one of which implicated the Union and is raised in this petition: the court ruled that the intra-departmental bidding priority contained in the collective bargaining agreement between the employer and union perpetuated the effects of the employer's pre-1956 initial assignment discrimination and, therefore, unless justified by business necessity violated Title VII. It was the Union's contention below that the priority was an integral part of a seniority system protected by § 703(h) of Title VII. While the court below acknowledged that the intra-departmental priority applied equally to blacks and whites, and was neither negotiated nor maintained with a discriminatory purpose, the court held nonetheless that § 703(h) was not applicable, reasoning that the priority was not part of a "seniority system" within the meaning of § 703(h).

The Union seeks review because on an issue of great practical importance to employers and unions the decision below (1) is contrary to Congress' intent in enacting § 703(h) and to the construction given to § 703(h) by this Court in *Teamsters* v. *U.S.* 431 U.S. 324 (1977), (2) squarely conflicts with the decision of another circuit rendered post-*Teamsters*, but (3) is one of several recent decisions construing *Teamsters* in a manner which we believe undermines § 703(h).

Facts

Petitioner, Local 13000, United Steelworkers of America, AFL-CIO-CLC (hereinafter "the Union") is the exclusive bargaining representative of the production and maintenance employees at the Chalmette, Louisiana plant of Kaiser Aluminum and Chemical Corporation (hereinafter "the Company"). The Company employs more than 2400 people at the Chalmette plant, of whom approximately 20% are black.

When the plant was first opened in 1951, the Company assigned blacks only to positions as laborers and porters. The Company ceased this racially discriminatory assignment policy in 1956 at the latest, and from that point forward hired and assigned production employees on a nondiscriminatory basis.

At all times material to this case, the central feature of the collective-bargained seniority system at the plant has been the intra-departmental bidding priority: when a vacancy arises in a high-level job in a department, the employees eligible to bid for that vacancy are those already working in that department. When such a vacancy is filled, there is a resultant vacancy in the entry-level job in the department, and *that* vacancy is available to employees elsewhere in the plant who wish to transfer to that department.

Beginning at least as early at 1956, all employees in the plant, including the blacks who were discriminatorily assigned from 1951-56, had a right to transfer to other production departments. The right to make interdepartmental transfers was afforded on the basis of seniority, plant service being the seniority measure from at least as early as 1962.

By reason of the intra-departmental bidding priority, the seniority system normally operates so that an employee desiring to transfer from one department to another must enter at the lowest level job in the new department. He is then given a 10 day trial period in his new department, at the end of which he must decide whether he wishes to re-

main in the new department or to return to his former job. If, upon expiration of the 10 day trial period, he elects to remain in the new department, he forfeits his right to return to his prior job, but may from then on bid for all vacancies arising in any of the higher level jobs in his new department, with plant seniority as the competitive measure. The transferring employee may not bid on such higher jobs in his new department prior to the expiration of the 10 day trial period.

The provisions that interdepartmental transfers be to entry level jobs, and that the right to bid thereafter for higher level jobs in the new department accrues only upon completion of a 10 day trial period, have been at all times uniformly applied to blacks and whites, and there is no contention that they were either negotiated or maintained with a discriminatory purpose.

Proceedings Below

The plaintiffs contended that these provisions violated Title VII, despite their neutrality and lack of discriminatory purpose, because they perpetuated the effects of the Company's pre-1956 discrimination in initially assigning blacks to laborer and porter jobs. Specifically, plaintiffs contended that these requirements: (1) discouraged pre-1956 discriminatees from transferring, because they would first have to take an entry level job in the new department, often at lower rates of pay; and (2) delayed their advancement to their "rightful place" (the jobs which they would now be occupying had they initially been assigned to the new department) by preventing them from transferring directly from their old department to a high level job in the new department.

The lawsuit was tried prior to this Court's decision in *Teamsters, supra,* at a time when the law of the Fifth Circuit invalidated seniority systems which perpetuated the effects of pre-Title VII employer discrimination even when such systems were negotiated and maintained without discriminatory intent. Nevertheless, even applying the

then-prevailing Fifth Circuit standards, the district court concluded that as a matter of fact the challenged provisions did not have the effect of locking employees into the departments to which they had been discriminately assigned,[2] and consequently did not violate Title VII. This ruling was made upon a motion of defendants at the close of the plaintiffs' evidence, and resulted in a dismissal and judgment pursuant to F.R. Civ. P. 41(b).

The plaintiff class appealed from this ruling (as well as from certain other rulings involving claims solely against the Company) to the Fifth Circuit. The Fifth Circuit, in an opinion issued about a year after *Teamsters* had been decided, acknowledged that the seniority provisions in question were not the product of any discriminatory purpose or intent, and that they applied equally to all employees regardless of race. Nevertheless, the Fifth Circuit, disagreeing with the district court's finding that these provisions had had no "lock-in" effect, reversed the dismissal of plaintiffs' challenge to the provisions, and declared that even though they fostered safety and efficiency they would have to be invalidated unless defendants could show that they were required by "business necessity."

[2] The district court made the following finding of fact (App. 7a): "The evidence established beyond a doubt that many black employees have taken advantage of these transfer opportunities and have rapidly advanced to higher paying jobs.

"This Court finds that the method of transfer from department to department at the Chalmette Works does not discriminate against the class. This Court further finds that there is no loss in an employee's seniority as a result of his transferring between departments and that there is full plant seniority carryover on all such transfers. It should also be noted that a substantial number of black employees, who testified at the trial, had reached the top jobs in their respective departments prior to the passage of the Civil Rights Act of 1964. Such evidence clearly illustrates that the seniority system, as developed through the collective bargaining process, does not now nor did it historically exclude blacks or other employees from utilizing their plant seniority for transfer and promotion at the Chalmette Works."

The Fifth Circuit cited *Teamsters* in two sections of its opinion dealing with unrelated claims against the Company (App. 32a, 39a). However, *Teamsters* was not cited in the portion of the opinion relating to the seniority system. Instead, the court applied its pre-*Teamsters'* decisions to strike down the provisions described above, declaring that the "system gives the old seniority criterion a continuing discriminatory effect" (App. 42a). The court's analysis was as follows:

> ". . . We have held that similar plans that restrict transfer to entry level jobs and limit advancement to upper level jobs to persons already in the department are invalid. . . . Such a system gives the old seniority criterion a continuing discriminatory effect; blacks are kept at a disadvantage begun by the past practices that kept them out of the nonlaborer departments. . . . We hold that the District Court's finding is based on a mistaken understanding of what constitutes the 'present effects of past discrimination,' and cannot stand." (App. 42a).

The Union petitioned for rehearing, noting that the court's opinion was based upon its pre-*Teamsters'* decisions, which were no longer good law, and that in light of *Teamsters,* the court could not invalidate a seniority system which applied equally to white and blacks and indisputably was neither negotiated nor maintained with a discriminatory purpose. In denying rehearing, the court issued an opinion declaring that it had been fully aware of *Teamsters,* and that its conclusion that plaintiffs had established a *prima facie* case with respect to the intra-departmental priority had not "rested upon a theory of liability repudiated in *Teamsters,* although our discussion of the system of interdepartmental transfers established by the Kaiser-Union collective bargaining agreement . . . might have been somewhat more explicit in this regard." (App. 50a). The court explained that the challenged provision "is not a seniority rule at all" and thus "is not immunized by § 703 (h) and *Teamsters," ibid:*

> "We did, however, hold clearly and unmistakably that the central problem with the system of interdepartmental transfers was the ten-day bottom entry requirement, the result of which is that employees can use their plant seniority to bid for jobs in a new department only if they are willing to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten-day waiting period. While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters,* the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by § 703(h) and *Teamsters."* (Emphasis in original).

The case was thus remanded to the district court under terms which will require that court to invalidate the challenged provisions unless defendants can show that they are required by "business necessity," even though the provisions were negotiated without discriminatory intent and were maintained for reasons of safety and efficiency (App. 42a-43a).

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Below Is In Direct Conflict With A Decision Of Another Circuit And Is Inconsistent With A Controlling Precedent From This Court On An Important Question Of Federal Law

Section 703(h) of Title VII provides in part:

> ". . . it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . *system,* . . . provided that such differences are not the result of an intention to discriminate because of race. . . ." (Emphasis added).

In *Teamsters* v. *United States,* 431 U.S. 324 (1976), this Court ruled that a seniority system does not lose the protection of §703(h) because it has the effect of perpetuating pre-Title VII discrimination:

> "... [W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." (*Id.* at 353-354, footnote omitted.)

In its initial opinion, the court below did just what *Teamsters* forbade: it found the departmental preference and ten-day waiting period to be *prima facie* unlawful "simply because [they] may perpetuate pre-Act discrimination." In its further opinion denying the petition for rehearing, the court sought to rationalize the apparent inconsistency of its holding with this Court's holding in *Teamsters* (App. 50a):

> "While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by §703(h) and *Teamsters*." (Emphasis in original).

As we show herein, the Fifth Circuit's attempt to carve out integral parts of the seniority system from the protection of §703(h) conflicts squarely with the decision of the Sixth Circuit in *Alexander* v. *Aero Lodge No. 735, Intern. Ass'n, Etc.*, 565 F.2d 1364 (6th Cir. 1977); and misconstrues the rationale of this Court's holding in *Teamsters*. As we further show, the decision below is not aberrational; the same misconstruction of *Teamsters* has been adopted by a panel of the Fourth Circuit and another panel of the Fifth Circuit, and the issue is currently pending decision in numerous cases in the lower federal courts.[3] The issue presented here is, accordingly, worthy of review by the Court at this time.

1. In *Alexander, supra*, the Sixth Circuit faced the issue

[3] If the court below were correct in its ruling as to the issue discussed in text, then this case would raise other issues worthy of this Court's consideration. See pp. 17-18, *infra*.

raised here on analytically indistinguishable facts. As described in the court's opinion, the feature of the seniority system in *Alexander* which the district court (pre-*Teamsters*) had found to have perpetuated pre-Act discrimination was the following:

> "The district court, in its opinion, particularly stressed that the job equity feature was primarily responsible for perpetuating pre-Act discrimination. The 1965, 1968, and 1971 contracts all gave an absolute preference in filling a vacancy to employees with prior, satisfactory service in the particular occupation. In other words, whenever a vacancy occurred, all employees having equity in that occupation were given the right to return to that job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. Similarly, when layoffs were ordered, employees could return to occupations they had formerly held if their current jobs were eliminated. The effect of this system was that an employee with job equity would always be preferred over an employee without job equity, even though the latter was deemed qualified for the position by the Company and had longer plant-wide service."

565 F.2d at 1376-1377. The *Alexander* court expressly rejected the argument that the "job equity features" of the system there could be carved out from the rest of the seniority system and thus be found outside the protection of §703(h):

> "With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under §703(h) of the Act. The Act, however, speaks not simply of seniority but of "a bona fide seniority ... system." A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our

view, an integral part of Avco's unique but nonetheless bona fide seniority system.

Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination." (Footnote omitted).

Accord: *Croker* v. *Boeing Co.* (*Vertol Div.*), 437 F.Supp. 1138, 1186-1188 (E.D. Pa. 1977).

2. In *Teamsters*, this Court found that

"the congressional judgment was that Title VII should not . . . water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."

431 U.S. at 353. As the *Teamsters* court recognized, Congress accomplished that goal by extending a measure of protection to seniority "*systems.*" Seniority systems are not abstract constructs. They exist as a means to choose between employees in allocating employment opportunities. As this Court has repeatedly recognized, one of the "major functions" of seniority systems "is to determine who gets or keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766 (1976). Once a seniority system is established, employees depend on the rules of the system in planning their employment careers. It was this reliance that Congress meant to protect. *Teamsters*, 431 U.S. at 350-355.

There is no one form of seniority system. This Court found that Congress did not distinguish between the various forms of seniority systems in affording the protection of §703(h):

". . . [T]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. . . . The legislative history contains no suggestion that any one system was preferred." 431 U.S. at 355, n. 41.

Whatever the form, the heart of any seniority system consists of the rules determining eligibility to compete for given positions and the measure of competition. In some systems, the determination of eligibility to compete is implicit in the measure of competition. Thus, where the measure is departmental seniority, eligibility to compete is by definition limited to the members of a given department; where the measure is job seniority, eligibility is limited to those holding a particular job. Had this case involved a pure departmental seniority system, therefore, it would have been obvious to the Court below that limiting transfers by those outside the department to the entry level jobs was an integral part of a seniority system protected by § 703(h); for that was precisely what the Court held in *Teamsters*.[4]

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[4] In a departmental system, after all those within a department have exercised their respective seniority rights an opening will result, generally in a bottom level job in the department. *Teamsters* itself describes this basic phenomenon in the context of a bargaining unit seniority system:

"For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining-unit seniority that controls. Thus, a line driver's seniority, for purposes of bidding for particular runs and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal. *The practical effect is that a city driver or serviceman who transfers to a line-driver job must* forfeit all the competitive seniority he has accumulated in his previous bargaining unit and *start at the bottom of the line drivers' 'board'.*" (Footnotes omitted, emphasis added).

Normally, departmental seniority systems will include a set of seniority rules for filling the resulting vacancy in the entry-level job in a department—*e.g.*, employees in all other departments might be eligible to compete for it based upon their plant seniority.

But what the Court below apparently failed to understand is that the seniority system here, albeit slightly different in its struture, is governed by the same legal principle. Ironically, the only difference between a pure departmental system and the system involved here is that the system here provides more opportunity than a pure departmental system would for an employee from outside a department to advance rapidly to higher level jobs within the new department—for here, as we show below, upon becoming a permanent employee in the new department, he can bid for any job based upon his *plant* seniority.

It is quite common to find large mills divided into functional departments, with plant seniority (rather than departmental seniority) the measure of competition *as between those within a department*. This is the system now uniformly operative in the steel and aluminum industries. Indeed, where plant seniority is the measure of competition, limiting the competitors for a vacancy to those within a department is a practical imperative.[5]

The system in this case is one common form of a "plant seniority within departments" system. Whenever a vacancy exists in other than an entry-level job within any department, all permanent employees within the department are eligible to compete for it, but the measure of competition is length of plant, rather than department, service. All employees in the other departments in the plant are then eligible to bid for the resulting vacancy in the department, with length of plant service as the measure of that competition as well. After the ten-day trial period, the employee filling such a resulting vacancy would then become a permanent employee in that department eligible, as are all other perma-

[5] Otherwise the employer would confront the impossible burden of moving a series of employees all over the mill each time a vacancy arises (with each successful bidder creating a vacancy by his departure). This spectre—commonly called "musical chairs"—is precisely what the decision below appears to necessitate.

nent employees in the department, to bid on any vacancy within the department based upon his plant seniority.

The decision of the court below artificially severs from the seniority system the rules excluding from competition for non-entry-level jobs in a department all who are not permanent employees within the department, i.e., those who have not been in the department at least ten days. Stated otherwise, the court below held that a collective bargaining provision declaring that the eligible bidders for a vacancy in a department are those permanently employed in that department is not part of a "seniority system" within the meaning of § 703(h). This holding is reached, without a word of analysis, simply by declaring the provision not to be a "seniority rule" but rather a "condition upon *transfer* wholly extraneous to the prevailing seniority system." (App. 50a).

That holding reflects a fundamental misunderstanding of the nature of seniority systems and thus of the extent of the protection established by § 703(h), as the Sixth Circuit recognized in *Alexander, supra*. The effect of the holding is to require that pre-1956 discriminatees outside a department be permitted to compete on an equal basis with those within the department, unless the defendants can prove such a change precluded by "business necessity." But *Teamsters* expressly declared that parties could continue to conduct competition on the basis of existing bidding lists (there, line-drivers; here, those within a given department) even if certain employees were kept from those lists as a result of pre-Act discrimination:

> "[*T*]*he congressional judgment was that Title VII should not outlaw the use of existing seniority lists* and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.
>
> ". . . Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

> "That conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other [departments] . . . Congress in 1964 made clear that a seniority system is not unlawful because it honors employees' existing rights . . . It would be . . . contrary to that mandate to forbid the exercise of seniority rights with respect to discriminatees who held inferior jobs . . ." 431 U.S. at 353-355 (emphasis added).

The holding of the court below that elements of a seniority system may be treated as outside the scope of § 703(h) cannot be reconciled with this Court's decision in *Teamsters*.

3. There are innumerable cases now pending in the lower courts which will turn upon the correctness of the decision below. A provision defining the eligible bidders as those within a department, such as the one at issue here, is a common feature of seniority systems. Indeed, such a provision is incorporated in the seniority system set up in the steel industry consent decree which applies in approximately 250 basic steel plants throughout the country.[6] In many cases which began, pre-*Teamsters*, as attacks on seniority systems alleged to perpetuate discrimination, the approach of plaintiffs and sometimes courts has now shifted to that adopted by the court below: isolate segments of the seniority system; declare that they are "extraneous" to the system; and then proceed to the result which would have been reached pre-*Teamsters*. See, *e.g.*, *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 303, 305-306 (4th Cir. 1978) (holding that seniority rules limiting competition to those on the next lower rung of a line of progression are outside the coverage of § 703(h)); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-1200 (5th Cir. 1978) (holding that line of progression rules—as in *Patterson*—and departmental priority rules—as here—are outside the scope of § 703(h)).

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[6] The Fifth Circuit reviewed that decree with approval in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Unless this issue is resolved now, unions and employers will face, unnecessarily, continued extensive litigation of a particularly burdensome nature, since the effect of finding a seniority rule unprotected by § 703(h) is to make it a vehicle for litigating claims of discrimination dating back—as here—well before the passage of Title VII.[7] Moreover, the prospect of decisions like that below will necessarily affect and distort the collective bargaining process in numerous industries. If the decision below is incorrect, as we believe it is, this Court should act promptly to interdict the proliferation of an erroneous notion which will cause much mischief and will inevitably require this Court's attention.

4. If we should prove wrong that the provisions at issue here are covered by § 703(h), then this case would raise additional issues which are worthy of this Court's consideration.

In *Teamsters*, 431 U.S. at 349, this Court indicated that were it not for § 703(h) a seniority system which "perpetuates the effects of prior discrimination" would be subject to attack under the rationale of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). This Court has never had occasion to define the parameters of the perpetuation doctrine. Were the provisions at issue here not protected by § 703(h), the question would arise whether the Fifth Circuit applied the proper standard in reversing the finding of the district court that the intra-departmental priority and ten-day trial period did not constitute actionable "perpetuation" of assignment discrimination that had occurred some twenty years earlier—in the context of a plant seniority system that had made inter-departmental mobility a reality since well before the enactment of Title VII. And, the related question would arise whether Title VII permits the litigation and remedying of alleged pre-Act discrimination, which

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[7] For example, the Steelworkers Union alone is defending a number of challenges to its indisputably "bona fide" seniority system predicated upon the rationale adopted below.

is not directly actionable, through the mechanism of a suit nominally directed at a current, otherwise lawful employment practice—i.e., the validity of the current practice would, under the Fifth Circuit's ruling, depend entirely on whether the Company had discriminated a decade before the passage of the Act. See *Machinists Local* v. *Labor Board*, 362 U.S. 411 (1960); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HARRIS A. PARSON AND ARCELL WILLIAMS,
Plaintiffs,

versus

KAISER ALUMINUM AND CHEMICAL CORPORATION, LOCAL 225, ALUMINUM WORKERS INTERNATIONAL UNION, CHALMETTE, LOUISIANA AND INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
Defendants.

Civil Action No. 67-1257
SECTION "E"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought pursuant to Title VII of the "Civil Rights Act of 1964," as amended, 42 USC § 2000e, *et seq.*, and Section 1 of the "Civil Rights Act of 1866," 42 USC § 1981, in which plaintiffs, individually and as representatives of a class, have prayed for relief for alleged discrimination in employment.

This matter is now before the Court on motions filed by all defendants at the conclusion of plaintiffs' case in chief for involuntary dismissal. I grant defendants' motion for involuntary dismissal and make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.

Plaintiff, Harris A. Parson (hereinafter referred to as "Parson") is a Black citizen of the United States and the State of Louisiana.

2.

Plaintiff, Arcell Williams (hereinafter referred to as

"Williams") is a Black citizen of the United States and the State of Louisiana.

3.

Defendant, Kaiser Aluminum and Chemical Corporation (hereinafter referred to as "Kaiser") is a corporation organized under the laws of the State of Delaware and maintains and operates an aluminum reduction plant in Chalmette, Louisiana (hereinafter referred to as "Chalmette Works"). It is an employer in an industry affecting commerce and employs more than twenty-five employees.

4.

Defendant, United Steelworkers of America, AFL-CIO, CLC (hereinafter referred to as "Steelworkers"), is a labor organization in an industry affecting commerce, and has more than twenty-five members. The Steelworkers became the certified collective bargaining agent for all production and maintenance employees at the Chalmette Works on August 9, 1972, after merging with and succeeding defendant, International Union of District 50, United Mine Workers of America (hereinafter referred to as "District 50").

5.

Defendant, District 50, became the collective bargaining agent for production and maintenance employees on July 14, 1968, succeeding defendant, Aluminum Workers International Union and its Local 225. District 50, the Aluminum Workers, and Local 225 are or were all labor organizations in an industry affecting commerce and have or had more than twenty-five members.

6.

Defendant, Local 13000, United Steelworkers of America (hereinafter "Local 13000"), which was prior to merger a local union of District 50, is a labor organization in an industry affecting commerce, and has more than twenty-five members.

7.

This action was brought individually by Parson and Williams and was subsequently amended to allege a class action under Rule 23 (b)(2) of the Federal Rules of Civil Procedure. The Court heretofore has found that this is a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that the class consists of all Black hourly employees who were employed at the Chalmette Works at the time of trial.[1]

8.

Plaintiff, Parson, was first employed at the Chalmette Works as a laborer in August, 1953. After holding several intermediate jobs, Parson was promoted on July 27, 1964 to the job of furnace operator which is a top job in the Metal Products Department. Parson's promotion to the job of furnace operator was prior to the effective date of the Civil Rights Act of 1964.

9.

In June, 1966, and on several occasions thereafter, Parson requested to be considered for promotion to foreman and/or Foreman Trainee in the Metal Products Department. The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because he was not qualified. In fact, other black men have been made foreman and other salaried positions in a number of departments of the Chalmette Works. For example, the Senior Industrial Relations Representative and the Supervisor of the Employment Office, who is in charge of the recruiting and hiring of all hourly workers, are both black.

10.

The process for the selection of a foreman by Kaiser is untainted by any overtones of racial discrimination. Al-

[1] Determination of the class, in oart, was made by sending a notice to all hourly Black employees employed by Kaiser at the Chalmette Works at the time of trial. All employees who chose *not* to be bound by this action are listed in Appendix A.

though the post of foreman is not controlled by the Collective Bargaining Agreement, as vacancies occur they are posted on the plant bulletin board and any employee can initiate, on his own behalf, an application for consideration as foreman. All applications for foreman are considered by a review board. Individuals who have initiated an application are reviewed and evaluated by a Management Committee composed of: the Industrial Relations Superintendent, the Employee's Supervisor, the Departmental Supervisor where the vacancy exists, the plant manager or his designee, and a Black representative.

11.

Plaintiff, Williams, was first employed at the Chalmette Works as a laborer in January, 1953. Williams worked in several jobs and departments during the 13-year period that he was employed by Kaiser. In 1962 Williams became an assistant furnace operator (the second highest job in the department) in the Metal Products Department.

12.

In July, 1966, Williams was given a five-day suspension prior to discharge and was subsequently discharged. The evidence demonstrates that Williams had a long and poor disciplinary record and was dismissed for just cause.

13.

Following his discharge, Williams filed a grievance with Local 225, which was subsequently processed through the various steps of the grievance procedure as set forth in the parties' Collective Bargaining Agreement. After Local 225 investigated all of the facts surrounding Williams' complaint, the grievance was dropped short of arbitration. The Court finds that neither Local 225 nor the Aluminum Workers breached its duty of fair representation to Williams in its handling of his grievance.

14.

Plaintiffs complain that Kaiser discriminated against blacks as a class, by "(r)equiring (them) . . . to use segregated shower rooms, lunch rooms, comfort facilities and drinking fountains located at its plant." However, the testimony at trial proved that beginning in 1963, Kaiser actively moved to desegregate its facilities by removing all signs and by posting notices on the company bulletin boards that all the facilities at the Chalmette Works were available to all employees. The company even tore down some of its existing facilities and rebuilt them into single room facilities that were available to all employees. The evidence demonstrates that today there are no segregated facilities at the Chalmette Works.

15.

Plaintiffs complain that Kaiser not only discriminated against plaintiff Parson in failing to promote him to foreman but discriminated against blacks, as a class, in "failing and refusing to promote . . . the class . . . to foremen." As previously indicated herein, the evidence quite clearly demonstrated that blacks occupy many salaried positions at the Chalmette Works. There was no evidence indicating any present effects of any past discrimination which may have existed and the evidence relating to the selection process for foreman currently in operation at the Chalmette Works revealed no obstacles, overt or subtle, which prevent blacks from being promoted to the position of foreman. In fact, the very selection process that permits an individual to initiate his application for foreman and to be reviewed by a diversified Selection Committee contains appropriate safeguards to insure that blacks will be given consideration equal to that of whites.

16.

Plaintiffs complain that Kaiser refused to "promote and upgrade" the class, represented by plaintiffs "because of their race." To the contrary, the evidence adduced at trial indicated that blacks were in top positions even before the effective date of the Civil Rights Act of 1964, and since July 1, 1965, the upward movement for blacks has not been retarded by any artificial barriers or requirements. In fact, the evidence showed both that blacks and whites enjoy the

same upward mobility and that there are no present effects of past discrimination.

17.

Plaintiffs complain that Kaiser discriminated against the class by "engaging in racial discriminatory policies and practices by and through means of enforcing more stringent punitive measures for infraction of rules against Negro employees." The record is totally void of any evidence to support this claim. As previously indicated, the disciplinary action taken by Kaiser against plaintiff Williams, which ultimately resulted in his termination, was justified.

18.

Plaintiffs complain that Kaiser discriminates against the class by maintaining "... a promotional and seniority system which continues and preserves, and which has the effect of continuing and preserving, Kaiser's policy, practice and usage [of] limiting the employment and promotional opportunities of Negro employees of the company because and by reason of color." Plaintiffs also allege that Kaiser has discriminated against the class by "(d)enying Negro employees the same rights of transfer ... as are afforded white employees." The complaints relative to promotion and/or upgrading have been considered above. Similarly, this Court finds that the seniority system employed by Kaiser does not "limit the employment and promotional opportunities of Negro employees" nor does Kaiser deny "Negro employees the same rights of transfer."

Although there was some testimony to the effect that blacks were excluded from some departments in the early 1950's, it was shown that by 1956, black employees had begun to transfer to almost every department at the Chalmette Works. There was also uncontroverted evidence that plant seniority was established for all purposes within the production departments by 1962 and that the same principle was applied in the craft departments by 1965. It was further shown that the seniority system in effect since 1962 allowed any employee to bid for a vacancy within his department on

the basis of his total continuous plant seniority. It was further shown that, although there are lines of progression in the various departments, an employee is not required to bid up the line job by job, but rather he may bid to any job in the department for which there is a vacancy and in so doing may move around other employees who are junior to him by plant seniority. It was further shown that an employee wishing to transfer between departments, who is a successful bidder, enters the new department for a 10-day trial period and if he decides that he does not like the department or the job to which he has transferred, he has a right to return to his former job without losing any seniority. On the other hand, if he wishes to stay in the new department, after expiration of ten-day period, the employee is free to bid on the basis of his qualifications and plant seniority on any vacancy in that department. The evidence established beyond a doubt that many black employees have taken advantage of these transfer opportunities and have rapidly advanced to higher paying jobs.

This Court finds that the method of transfer from department to department at the Chalmette Works does not discriminate against the class. This Court further finds that there is no loss in an employee's seniority as a result of his transferring between departments and that there is full plant seniority carryover on all such transfers. It should also be noted that a substantial number of black employees, who testified at the trial, had reached the top jobs in their respective departments prior to the passage of the Civil Rights Act of 1964. Such evidence clearly illustrates that the seniority system, as developed through the collective bargaining process, does not now nor did it historically exclude blacks or othey employees from utilizing their plant seniority for transfer and promotion at the Chalmette Works.

19.

Plaintiffs have generally claimed that the testing and training procedures employed at the Chalmette Works discriminates against the class. The testimony at the trial

indicated that prior to 1968, the company had required all applicants to pass the "Wonderlic Test" and various other tests used for promotional purposes within the departments of the Chalmette Works. In 1968 Kaiser evaluated their testing procedures and determined that the process was not valid for the purposes utilized. Consequently, in the latter part of 1968, the company abolished the testing procedure then in operation. There is, however, no evidence in the record to suggest that but for the use of the tests prior to 1968, any member of the class would have obtained a higher paying position. Except for some craft positions, no testing is currently utilized. In order to qualify for a crafts position an applicant need only possess two years industrial experience or comparable trade school or service connected experience. For some craft jobs an applicant is required to perform a practical exercise, such as building a cement brick wall, to demonstrate his qualifications as a bricklayer. I find that the requirement that applicants for crafts positions possess some experience does not discriminate against the class.

20.

The testimony revealed that the training for most positions at Kaiser is obtained through direct observation and participation in the particular tasks of that job ("on-the-job training"). However, in some instances Kaiser has developed training programs for certain positions. There was no evidence at the trial that these methods of training discriminated against the class. In fact the testimony indicated that blacks were able to avail themselves of these training opportunities and thereby advance as rapidly as whites up the line of progression in the various departments at the Chalmette Works.

21.

Plaintiffs have generally complained that the "lay-off pool" discriminates against the class. The "lay-off pool," which is fully described and detailed in the Collective Bargaining Agreement, sets forth the procedure which is followed when there is a partial or plant-wide reduction in the work force at the Chalmette Works. This Court finds from the evidence adduced at trial that this mechanism, for determining which employees must leave the plant in the event of a reduction in the work force and which employees are returned to work when the work force is increased after reduction, does not discriminate against the class because there was no past discrimination in hiring laborers.

22.

Plaintiffs claim that the defendants, Local 225, District 50 and Steelworkers, discriminated against the class as follows:

(a) Refusing and failing to file and process grievances which refusal is the result of racial discrimination pursued by the Local.

(b) Refusing and failing to accord plaintiffs and the class represented fair and adequate representation.

(c) Otherwise generally discriminating against plaintiffs and the class represented because of and by reason of their race.

However, with the exception of testimony relating to plaintiff Williams, plaintiffs failed to introduce any conclusive evidence with regard to the contentions relating to unfair representation in the day-to-day handling of grievances. This Court has previously indicated its position regarding Local 225's process of Williams' discharge grievance.[2] The evidence introduced by the plaintiffs with respect to union representation revealed that the unions consistently processed the grievances of black employees in good faith; the testimony also revealed that blacks have continually held significant positions in the various unions.

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[2] Local 225 had successfully processed a prior discharge grievance in 1965 for Williams which resulted in Williams' reinstatement.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of this action pursuant to 28 USC § 1345 and 42 USC § 2000e-5(f)(3).

2.

The individual plaintiffs, Parson and Williams, are authorized to institute this action under 42 USC § 2000e, *et seq.*, and 42 USC § 1981.

3.

Under Rule 23 of the Federal Rules of Civil Procedure, Parson and Williams represent a class which consists of all Black hourly employees who were employed at the Chalmette Works at the time of trial, with the exception of those individuals who opted not to be represented by Williams and Parson and who are listed in Appendix A hereto.

4.

Defendant, Kaiser, is an employer within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 USA § 2000e(b) and is engaged in an industry affecting commerce within the meaning of Section 701(h) of the Act, 42 USC § 2000e-(h).

5.

Defendant, Steelworkers, is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC § 2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC § 2000e-(e).

6.

Defendant, District 50, which merged with Steelworkers, is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC § 2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC § 2000e-(e).

7.

Defendant, Local 225, is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC § 2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC § 2000e-(e).

8.

Defendant, Kaiser, did not discriminate against Parson within the meaning of 42 USC § 2000e, *et seq.* or 42 USC § 1981 and, particularly, Kaiser did not violate the provisions of 42 USC § 2000e, *et seq.* or 42 USC § 1981 in failing to promote Parson to the position of foreman.

9.

Defendant, Kaiser, did not discriminate against Williams within the meaning of 42 USC § 2000e, *et seq.* or 42 USC § 1981 and, particularly, Kaiser did not violate the provisions of 42 USC § 2000e, *et seq.* or 42 USC § 1981 in terminating Williams' employment.

10.

Defendant, Local 225, did not discriminate against Williams within the meaning of 42 USC § 2000e, *et seq.* or 42 USC § 1981 and, particularly, did not violate the provisions of 42 USC § 2000e, *et seq.* or 42 USC § 1981 with respect to handling Williams' grievances.

11.

Defendants, Kaiser, Local 225, District 50, and Steelworkers, have not since July 1, 1965, and do not presently discriminate within the meaning of 42 USC § 2000e, *et seq.* or 42 USC § 1981 against the class previously identified and represented by Williams and Parson. The Court further concludes, as a matter of law, that there are no present effects of any past discrimination at the Chalmette Works.

12.

Defendant, Kaiser, has not maintained segregated facilities at the Chalmette Works since July 1, 1965, and, accord-

ingly, has not violated the provisions of 42 USC § 2000e, *et seq.*

13.

While some segregated facilities were maintained by Kaiser at times prior to July 1, 1965, in violation of 42 USC § 1981, the class is not now entitled to an injunction for such previous violations. An injunction is remedial, not punitive, *Hodgson* v. *First Fed. Sav. & L. Ass'n.*, 455 F.2d 818 (5th Cir. 1972), and looks to the future, not the past, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). Thus, an injunction should not issue where the basis for it has been removed, *Roberts* v. *Pegelow*, 313 F.2d 548, 552 (4th Cir. 1963); *Black* v. *Brown*, 355 F.Supp. 925 (N.D. Ill. 1973).

14.

Defendant, Kaiser, has not discriminated against the class in the selection of foremen since July 1, 1965, and, accordingly, has not violated the provisions of 42 USC § 2000e, *et seq. Rowe* v. *General Motors Corp.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

15.

The class is not entitled to any affirmative relief for any possible pre-July 2, 1965 discrimination in the selection of foremen. An injunction is not in order since any alleged violations have been cured and no member of the class is entitled to back pay for these alleged violations since back pay claims under § 1981 are limited to July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, *Johnson* v. *Goodyear Tire and Rubber Co.*, 7 DPD ¶ 9233 (5th Cir. Mar. 27, 1974), and plaintiffs have failed to show that the class sustained any damages after July 1, 1965 as a result of possible violations.

16.

Defendant, Kaiser, has not since July 1, 1965, and does not now discriminate against the class with respect to its policies relating to promotion and upgrading and, accordingly, has not violated either the provisions of 42 USC

§ 2000e, *et seq.*, or the provisions of 42 USC § 1981 from that date. Plaintiff is not entitled to the affirmative relief sought for violations of 42 USC § 1981 occurring prior to that date because the prohibited conduct has ceased, back pay prior to July 1, 1965 is not recoverable, and there is no evidence of present effects of past discrimination.

17.

Defendant, Kaiser, does not discriminate against the class with respect to its policies relating to disciplinary action for the infraction of company rules and, accordingly, has never violated the provisions of 42 USC § 2000e, *et seq.* and 42 USC § 1981.

18.

Defendants, Kaiser and Steelworkers, do not now discriminate and have not discriminated since at least July 1, 1965, with respect to their promotional and seniority system, including the transfer provisions thereof, and, accordingly, have not violated the provisions of 42 USC § 2000e, *et seq.* While violations of 42 USC § 1981 may have occurred in this area prior to that date, no injunction will issue because the prohibited behavior has long since ceased, and no damages are recoverable for back pay prior to that date. Further, unlike the seniority systems discussed and analyzed in *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD § 9233 (5th Cir. Mar. 27, 1974); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972), the promotional and seniority system, including the transfer provisions thereof, in effect at the Chalmette Works does not disclose any present effects of past discrimination, nor has the system prevented members of the class from achieving the top position to which they are entitled.

19.

Defendant, Kaiser, has not since 1968 discriminated against the class with respect to its testing and training procedures and, accordingly, is not presently violating the pro-

visions of 42 USC § 2000e, *et seq.* or 42 USC § 1981. Kaiser, on its own motion, has abolished written testing, especially the "Wonderlic Test," and has guided itself in conformity with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970); *United States* v. *Georgia Power Co., supra,* and *Johnson* v. *Goodyear Tire and Rubber Co., supra.* While the use of the Wonderlic Test prior to 1968 may have constituted unlawful discrimination, no injunction will issue because the violations have long since been corrected and no award for back pay will be made because the mere showing of discriminatory employment practices is not by itself a proper premise for making a back pay award. There must be more, namely, "positive proof that plaintiff was ordinarily entitled to the wages in question and being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed." *United States* v. *Georgia Power Co.,* 474 F.2d 906, 921, 922 (5th Cir. 1973); *Jinks* v. *Mays,* 464 F.2d 1223, 1226 (5th Cir. 1972). Since there has been no presentation of positive proof that any members of the class would have achieved a higher paying position but for the use of the Wonderlic Test, the class is not entitled to recover any damages for back pay.

20.

Defendants, Kaiser and Steelworkers, do not now nor have they in the past discriminated against the class with respect to the operation of the "lay-off pool," and, accordingly, have not violated the provisions of 42 USC § 2000e, *et seq.* and 42 USC § 1981. Unlike the lay-off provisions discussed and analyzed in this Court's opinion in *Watkins* v. *Steel Workers (USA), Local 2369,* 7 EPD 9130 (E.D. La. Jan. 14, 1974), the lay-off pool operative at the Chalmette Works does not discriminate against black employees.

21.

Defendants, Local 225, District 50 and Steelworkers, do not now nor have they in the past discriminated against the class with respect to the filing and processing of grievances

and providing fair and adequate representation and, accordingly, have not violated the provisions of 42 USC § 2000e, *et seq.* and 42 USC § 1981.

22.

In accordance with the foregoing conclusions of law, there shall be judgment in favor of defendants, Kaiser, Local 225, District 50, and Steelworkers, and against plaintiffs, Parson and Williams, individually and as representatives of the class of all hourly employees employed at the Chalmette Works at time of trial, with the exception of those noted on Appendix A, dismissing their complaint, as amended, at their costs.

New Orleans, Louisiana, May 22, 1974.

FRED J. CASSIBRY,
United States District Judge

Copy to all counsel

[The following was Appendix A to the District Court's Findings Of Fact And Conclusions of Law]

PARSON ET AL V. KAISER ET AL
Civil Action No. 67-1257

SECTION "E"

JOSEPH AUGUSTUS
ALFRED BANK
WILLIAM CELESTIN
HERBERT COLLINS
SIMON R. CORNIN, JR.
ROBERT GEDAUL
GREG R. GREEN
LEROY HOLMES, JR.
JOE HOMER, JR.
SPENCER HOWARD
JOSEPH A. MARCHAND, SR.
JAMES PIERRE, JR.
EARL C. RAYMOND
JOSEPH G. SENEGAL
KELMER L. STEVERSON
FRANK TRIM

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Caption omitted]

JUDGMENT

This cause came on for trial on a former day, and after testimony of witnesses and argument of respective counsel, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein, and considering the direction of the Court as to entry of judgment.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Kaiser, Local 225, District 50, and Steelworkers, and against plaintiffs, Harris A. Parson and Arcell Williams, individually and as representatives of the class of all hourly employees employed at the Chalmette Works at time of trial, with the exception of those noted on Appendix A, dismissing their complaint, as amended, at their costs.

New Orleans, Louisiana, this 23 day of May, 1974.

/s/ FRED J. CASSIBRY,
United States District Judge

APPENDIX C

HARRIS A. PARSON,
Plaintiff-Appellant,

v.

KAISER ALUMINUM & CHEMICAL CORP., AND LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Defendants-Appellees

No. 74-3468

United States Court of Appeals, Fifth Circuit
July 10, 1978

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge and MILLER,* Associate Judge.

JOHN R. BROWN, Chief Judge:

Plaintiff, a black employee at the Chalmette, Louisiana plant of Kaiser Aluminum and Chemical Corporation (Kaiser), appeals from a judgment dismissing his individual and class claims of racial discrimination in employment. Finding errors of both fact and law in the dismissal at the close of the plaintiff's case, we reverse and remand.

I.

In July 1966, the named plaintiff, Harris Parson, filed a charge with the Equal Employment Opportunity Commission (EEOC) under section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), claiming that Kaiser discriminated against him on the basis of his race in refusing to promote him to the position of foreman. Parson also alleged that Kaiser maintained racially segregated facilities and that, with the cooperation of the employees, bargaining representative, Local 225 of the Aluminum Workers In-

* Of the U.S. Court of Customs and Patent Appeals sitting by designation.

ternational Union (Local 225),[1] denied black employees equal opportunities for advancement. The EEOC found reasonable cause to believe that Kaiser and Local 225 engaged in discriminatory practices and, after attempting a cure by conciliation, issued Parson a right to sue notice in August 1967.

Parson brought suit in September 1967, seeking relief against Kaiser under the Civil Rights Act of 1866, 42 U.S.C. § 1981,[2] and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*,[3] and against the Union for viola-

[1] At the time legal proceedings began, Local 225 was the bargaining representative for Kaiser's employees. Several replacements and mergers have occurred since that time, resulting in two changes in bargaining representative. These changes were reflected in additions to the party defendants named in the litigation. The present representative is Local 1300, United Steelworkers of America, AFL-CIO, CLC, named as a defendant and now an appellee in this suit.

[2] 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[3] 42 U.S.C.A. § 2000e-2 in pertinent part provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> • • •

tions of Title VII and of the duty of fair representation imposed by 29 U.S.C. §§ 151 *et seq*. Another black employee,

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

• • •

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

• • •

42 U.S.C.A. § 2000e-3 provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

Arcell Williams, joined Parson in the suit, claiming that he had been discriminatorily discharged. Parson and Williams subsequently amended their complaint to include allegations of discriminatory employment practices against a class of black hourly employees.[4] After extensive and prolonged pretrial proceedings, the case came to trial in 1973. At the conclusion of the plaintiffs' case, the defendants moved under F.R.Civ.P. 41(b) for an involuntary dismissal on the ground that "plaintiffs have shown no right to relief" on either their individual or class claims. The District Court recessed the trial, dismissed Williams' claim and, in May 1974, some fourteen months later, dismissed Parson's individual suit and the class action.[5] In its findings of fact and conclusions of law issued under F.R.Civ.P. 52(b), the District Court held that no discrimination was present in any of the actions or practices asserted by the plaintiffs. Parson appeals on behalf of himself and the class he represents from the judgment in favor of the defendants.

Although the complaint alleged a variety of discriminatory practices,[6] the appeal is limited to the following findings and conclusions: defendant Kaiser did not discriminate against Parson by refusing to award him the promotion he sought; Kaiser did not discriminate against the class in making promotions to supervisory positions; Kaiser did

[4] The District Court Judge ruled that the class action was valid under F.R.Civ.P. 23(b)(2) and found that the class consisted of all black hourly employees working at the Chalmette plant at the time of trial, except those who had chosen not to be represented by the named plaintiffs.

[5] No appeal was taken from the dismissal of Arcell Williams' individual claim.

[6] In particular, plaintiffs do not contest the findings or conclusions that the following allegations were meritless: segregation in plant facilities, discrimination in promotion and advancement to nonsupervisory positions or positions outside the crafts; discrimination in sanctioning infractions of plant rules; and discrimination in the composition of the "lay-off pool."

not discriminate in providing training and opportunities for entry to craft positions; and Kaiser and the Union did not discriminate in the contractual procedures governing bidding and transfers.

We hold that as to each of these issues, the District Court erred in holding that no discrimination was evidenced and in dismissing the suit. We reverse and remand for further proceedings consistent with the standards developed in this Circuit and the Supreme Court for judging claims of racial discrimination in employment.

II. The Challenged Employment Practices

Kaiser is engaged in the production of aluminum from powered alumina at the Chalmette facilities. At the time of trial, the plant employed over 2,400 people, of whom approximatly 20 percent were black. Kaiser has operated the Chalmette plant since 1951. At that time, blacks were hired only as laborers and the physical facilities of the plant were rigidly segregated.[7] Plaintiff's essential claim at trial and on this appeal is that insufficient progress has been made since then to satisfy the requirements of the civil rights statutes.[8]

---

[7] Our understanding of the organization of the plant and the details of its operation is somewhat hampered by the absence of defendants' evidence and by the state of the record that does exist, which, as the plaintiff's brief concedes, is highly disorganized.

[8] Discrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981 employment practices prior to 1965 may be examined. Secondly, this court specifically explained in *United States* v. *Jacksonville Terminal*, 451 F.2d 418, 441 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972) . . . that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects.

Pettway v. *American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 218 n. 10.

A. Promotions to the Position of Foreman

The plaintiff presented evidence tracing the evolution of the procedures for selecting foremen from the hourly employees.[9] Until April 1966, Kaiser had no written procedures or standards governing such promotions. At that time, Kaiser adopted a system requiring each shift foreman to evaluate the hourly employees under his supervision every six months and report the names of likely candidates. Those listed would be further screened by the general foremen and departmental superintendents, and if approved, would be administered two personnel tests, the Wonderlic Test and the How to Supervise Test. The candidates achieving sufficiently high scores would then be classified as "trainee foremen," a status that allowed them to replace absent permanent foremen and, depending on their success, to advance to a permanent position as openings occurred. Parson's application for promotion was considered one month after this procedure had been adopted.

This system for considering applicants was modified in June of 1967 to ameliorate the requirement that an hourly employee could not become a candidate for a supervisory position without his immediate foreman's recommendation. The revised procedure required each foreman to submit the names of those employees who had indicated a wish to be promoted, "but whom the Foreman believes do not have the qualifications." An applicant not approved by either his shift foreman or the department superintendent was further reviewed by a committee authorized to reverse the previous decisions and allow the employee to take the personnel tests.

The following year, Kaiser's program was revised, apparently to reflect and anticipate changes in the law of employment discrimination. The use of the Wonderlic Test for identifying qualified candidates was eliminated after a vali-

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[9] The "Foreman Selection Programs" for 1966, 1967, 1968, and 1970 are set forth in Appendix, Vol. II, at 183-93, Plaintiff's Exhibit 52-55.

dation study designed to relate the tests to the demands of the job failed.[10] In 1970, Kaiser further revised the procedure for selecting permanent foremen. This procedure was based on annual evaluations and recommendations from immediate supervisors subject to review by general foremen and department superintendents. When vacancies occurred, the department superintendent and personnel relations superintendent would select candidates from the group judged qualified in the annual screening. These prospects were interviewed and a choice recommended for the final approval of the plant works manager.

The last revision in the selection procedure relevant to this litigation occurred in April 1972. For the first time, vacancies in shift foremen positions were posted on a central bulletin board. An hourly employee interested in the position requested an application form, and the applications, together with the written evaluation of the applicant's foreman, were screened by a committee that interviewed the leading candidates and made a final recommendation. The committee, which consisted of five persons, had a frequently changing membership, and in at least one instance documented in the record, the membership included blacks. In making its selections, the committee used a written list of criteria and standards. This list represents the first written standards guiding the selection of supervisors used at the Chalmette plant.

The plaintiff's brief paints the following statistical picture of Kaiser's foreman population.[11] In July 1965, when

[10] In May 1967, the EEOC found reasonable cause to believe that the Wonderlic Test discriminated against black employees. Kaiser's subsequent validation study revealed that twice as many blacks failed the test as whites and that the test did not accurately predict job performance for either race. See Plaintiff's Exhibit 67.

[11] Kaiser and the Union contest the use of these statistics in Parson's brief to this Court, claiming that the figures are drawn from material never introduced into evidence, including answers to interrogatories, deposition testimony, and EEOC reports. Plaintiff admits that the data concerning the total number of foremen serving on a given date were drawn from Kaiser's answers to interrogatories not admitted into evidence. However, the information concerning the date and details of the appointments of black foremen is based on testimony and documents that were put in evidence at the trial. Plaintiff contends that the comparisons between these figures and the numbers concerning the total number of foremen can be drawn, in "somewhat less exact form," from Kaiser's Affirmative Action Report, which was introduced into evidence. Plaintiff's Exhibit 67. We have reviewed the record and are satisfied with the plaintiff's response.

Title VII became effective, there were 209 supervisors employed at the Chalmette plant, all of whom were white. Of these, over 150 served as shift foremen, the position to which Parson aspired. In July of 1965, Kaiser employed 1,873 hourly production workers, of whom 15 percent were black. In September 1971, when Kaiser filed its last responses to discovery motions, 164 shift foremen served at the plant, of whom 8, or less than 5 percent, were black.[12] At that time, more than 21 percent of Kaiser's hourly employees, and 29 percent of the hourly production workers, were black. Between July 1965 and September 1971, 9 blacks were promoted to shift foreman jobs. Between September 1971 and the time of trial, April 1973, 4 additional blacks were promoted.[13] All but one of this last group was selected under the 1972 selection procedure.

B. Interdepartmental Transfers

A Kaiser employee who desires to transfer to a position in another department must follow the procedures established by the contractual agreement between Kaiser and the Union. The Supplement Seniority Agreement [sic] of February 1, 1972, in effect at the time of trial, requires that vacancies for permanent jobs (except those openings subject to "departmental job bids," discussed below) are to

[12] Four of the eight black supervisors were in charge of janitorial workers; only one supervisor of janitors was white.

[13] Because one of the black foremen selected before 1971 had taken disability leave and a second had transferred to a nonsupervisory position, only ten black foremen chosen under the pre-1972 procedures were working at the plant at the time of trial.

be posted at centrally located bulletin boards and that employees are to use a formal bidding system to apply for the openings. Success in transfer is determined by either plant seniority alone or by a combination of plant seniority and other qualifications. To assess the impact of these procedures, it is necessary to examine the development of the transfer and seniority systems before and after the effective date of Title VII.

Kaiser restricted blacks to menial positions—laborer and porter—from 1951 to 1956, when blacks were allowed to transfer to some production departments.[14] Entry into production departments remained subject to other restrictions, however. A "passing" score on the Wonderlic Test was required as a condition of entry to some of the production departments until 1968. Until 1962, departmental seniority determined eligibility for transfer and advancement: employees within a department would bid on vacancies on the basis of their relative length of service within that department. In 1962, plant seniority was substituted for departmental seniority as the bidding standard within the production departments, and in 1962, plant seniority was adopted as the standard in the craft departments as well. Under this system, an employee's eligibility for bidding is based on his total length of service at the Chalmette plant.

The plaintiff's major complaint as to the present transfer system is that employees transferring to a new department can bid only for entry level jobs in that department, usually the job of "spare." Vacancies for positions above the entry level are posted only within that department and only employees already in the department are eligible to bid. A transferring employee must occupy the spare position in the new department for a minimum of ten days, during which time he may elect to return to his old job with no loss in pay, seniority, or eligibility for promotion in the old

[14] During this period, the laborer and porter positions were held exclusively by blacks. The lowest position for which white employees were hired was that of "spare." Testimony of Isadore Booker, testimony of J. B. Sims, R., Vol. VII.

department. At the end of the ten-day trial period, the transferee is eligible to bid for vacancies that arise in the new department on the basis of his plant seniority. If the spare job pays less than the job from which the employee has transferred, he must take the cut in pay until a higher paying job in the new department becomes available and the employee is able successfully to bid for it. A departmental employee thus has preference over employees from other departments for promotion to all nonentry level vacancies within his department.[15]

C. Entry Into Craft Positions

The craft positions at issue come within the jurisdiction of the Power Maintenance Department and the Reduction Maintenance Department at the Chalmette plant.[16] Most of the craft positions are filled without on-the-job training or apprenticeship programs. The following requirements are or have been conditions for entry to such positions.

Prior experience. Most of the craft jobs require previous experience in the craft involved. While the length and type of experience required varies from craft to craft, industrial experience is preferred. There is some evidence in the record that this requirement is not consistently applied and that decisions to waive or modify it are within the discretion of the supervisor involved in the hiring process.

Testing and educational requirements. Beginning in 1959 and continuing until 1968, Kaiser required that an applicant achieve a certain score on the Wonderlic Test as a

[15] This system does not apply to those jobs for which prior service in another, related position in the department is a prerequisite for bidding.

[16] The plaintiff's brief lists the craft categories at issue as electrician, lagger, lineman, instrument repairman machinist, mechanic, painter, welder, air conditioning mechanic, automotive mechanic, blacksmith, bricklayer, and carpenter. This list does not include skilled positions that are filled by bidding on the basis of seniority rather than by hire or transfer. See note 19, *infra*.

condition for entry to any craft position.[17] This requirement was dropped after a 1967 validation study indicated that the test could not satisfy the standards governing the permissible use of such employment devices.[18] Until 1968, Kaiser also required each applicant to take a written test relating to the skills of the particular craft involved. After these tests were eliminated, Kaiser used "structured interviews" to examine applicants orally on the same information. Until 1970, a high school diploma was a prerequisite for entry into several of the crafts.

Training programs. Kaiser adopted its first training program for craft jobs in April 1969. Under this program, which applied to the categories of electrician, instrument repairman, and mechanic, trainee jobs were open for plant-wide bidding. However, trainees were required to have completed two years of high school to be eligible for the mechanic program, to have a high school diploma for the other two craft programs, and to pass an aptitude test administered by the Louisiana State Employment Service. Two of the twelve craft trainees enrolled in the program after a little over one year of operation were black.

Parson draws on Kaiser's Affirmative Action Report for statistical information as to the impact of Kaiser's entry requirements.[19] Of the craftsmen employed in 1965, 3, or

[17] Kaiser did not require craftsmen who began work before the test was adopted to take the examination. All the exempt craftsmen were white.

[18] See note 10, *supra*.

[19] The figures in Kaiser's report include skilled production jobs that plaintiff does not group with the craft categories involved in this appeal. Plaintiff complains of discrimination only in the entry requirements of those craft positions filled by hire or transfer rather than by bidding on the basis of seniority. Kaiser's "skilled craftsmen" count results in different numbers but similar ratios:

1967—	629 white	4 black
1968—	648 white	16 black
1969—	655 white	24 black
1970—	606 white	19 black
1971—	591 white	23 black

Plaintiff's Exhibit 19.

less than 1 percent, were black. In 1971, 8 out of 468 craftsmen, or approximately 2 percent, were black. At the time of trial, there were a total of 11 black craftsmen employed at the plant, all working in the Reduction Maintenance Department. While Parson concedes that complete figures as to employee turnover in the crafts since 1965 are not available, he convincingly uses Kaiser's 1970 Seniority List to provide a rough estimate.[20] This list shows that Kaiser hired 22 of the 96 craftsmen in the Power Maintenance Department after 1965; 1 of the 22 was black. Of the 365 craftsmen in the Reduction Maintenance Department, 65 were hired after 1965, and of these, 3 were black.

Parson bases his challenges to the District Court's findings on the premise that in each of the areas detailed—promotions to foreman, transfer, and entry to the crafts—he presented a prima facie case of racial discrimination.

III. The District Court's Judgment

A. Parson's Individual Claim

Harris Parson was hired as a laborer at the Chalmette plant in 1953. In 1961, he transferred to the Metal Products Department as a "spare" and in 1964 was promoted to the semiskilled job of furnace operator, one of the top jobs in the department. In June of 1966, Parson requested that he be considered for the position of temporary foreman, the first black in his department to ask for such a promotion. After his request was denied, Parson filed a complaint with the EEOC and subsequently brought this suit. At trial, and on this appeal, Parson claimed that his work record was excellent, that his union activities demonstrated leadership capabilities, and that the only reasons for the failure to promote him were his race and his outspoken efforts to hasten the integration of the plant's facilities. To support his claim of racial discrimination, Parson introduced evidence of the comparative qualifications of white men who were promoted shortly after Parson's request was denied;

[20] See Plaintiff's Exhibit 19.

asserted that the procedures for awarding promotions themselves violated Title VII; and urged that statistics comparing the number of black and white foremen to the racial composition of the hourly employee population showed a pattern of discrimination in promotions at the plant. At the close of plaintiff's evidence, the District Court Judge made the following finding of fact:

> "The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because he was not qualified. In fact, other black men have made foreman and other salaried positions in a number of departments of Chalmette Works."

[Appendix, Vol. I, at 25.] On this basis, the District Court Judge concluded that Kaiser had not discriminated against Parson.

In reviewing the District Court's findings of fact, we are mindful of our limited authority under the clearly erroneous standard of F.R.Civ.P. 52(a). However, we are equally mindful that the clearly erroneous standard does not apply to findings made under an erroneous view of controlling legal principles. *United States* v. *Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24; *cert denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815; *Rowe* v. *General Motors Corp.*, 5 Cir., 1972, 457 F.2d 348, 356 n. 15. We are also careful in discrimination suits, where the elements of fact and the law become particularly intermeshed, of the distinction between findings of subsidiary fact and findings of ultimate fact. A finding of nondiscrimination is a finding of ultimate fact that can be reversed free of the clearly erroneous rule. "In reviewing the District Court's findings, therefore, we will proceed to make an independent determination of appeallant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous. . . . [W]e must [also] determine whether there are requisite subsidiary facts to undergird

the ultimate facts." *Causey* v. *Ford Motor Co.*, 5 Cir., 1975, 516 F.2d 416, 420-21 [citation omitted].

In a non-class claim of employment discrimination under Title VII, the plaintiff carries the initial burden of proving a prima facie case of discrimination. The elements of a prima facie case were delineated in *McDonnell Douglas Corporation* v. *Green*, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677: (i) the complainant must belong to a protected minority; (ii) must apply and be qualified for a job for which the employer is seeking applications; (iii) be rejected for the job; and (iv) the employer must then continue to seek applicants with the complainant's qualifications. When a plaintiff meets these criteria, the burden shifts to the defendant to show, by a preponderance of the evidence, that it had legitimate, nondiscriminatory reasons for its decision. If the defendant can meet this burden, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason is a pretext for discrimination. *McDonnell Douglas Corporation* v. *Green, supra*, 411 U.S. at 802-804, 36 L.Ed.2d at 677-79; *Turner* v. *Texas Instruments, Inc.*, 5 Cir., 1977, 555 F.2d 1251, 1255. The District Court's only finding of fact as to Parson's claim is that "he was not qualified" for the position of foreman. For the reasons outlined below, this finding cannot stand and cannot serve as the basis for a Rule 41(b) dismissal.

The District Court Judge offered no hints as to the basis for his finding that Parson was not qualified for promotion to the position of foreman. We are simply unable to determine whether the Judge found sufficient subsidiary facts to undergird the ultimate finding that the decision not to promote Parson was not racially motivated or taken in retaliation for his involvement in racial relations at the plant.[21] It is therefore necessary for us to reverse the dis-

[21] Parson's shift foreman, Jim Saucier, his general foreman, Jim Cruse, and the superintendent of the Metal Products Department, Paul Petit, testified at trial or through depositions introduced as evidence as to their reasons for denying Parson the promotion. Reports and memos by Saucier, Cruse, and Jim Mayeaux, who

missal of Parson's claim and demand for an articulation of the basis for the Judge's conclusion that Parson was not qualified to become a foreman. This articulation is to include an examination of the comparative qualifications of nonblacks promoted to foreman.

The District Court Judge's finding is also tainted by an incorrect understanding of the legal principles applicable to individual claims of racial discrimination in employment. It is clear law in this Circuit and in the Supreme Court that statistics as to the racial composition of the defendant's work force must be considered in judging individual allegations of discrimination. *Dothard* v. *Rawlinson*, 1977, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, 798; *International Brotherhood of Teamsters* v. *United States*,, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 417; *McDonnell Douglas Corp.* v. *Green*, 1973, 411 U.S. 792, 805, 93 S.Ct. 817, 36 L.Ed.2d 668; *Peters* v. *Jefferson Chemical Co.*, 5 Cir., 1975, 516 F.2d 447, 450-51, *Burns* v. *Thiokol Chemical Corp.*, 5 Cir., 1973, 483 F.2d 300, 306. Parson presented

served as Parson's foreman for a short time during the relevant period, both contemporaneous with the decision against promoting Parson and prepared later in connection with EEOC proceedings or this suit were also introduced. These sources contain several different grounds for Parson's failure to obtain his promotion, including inadequate performance as a furnace operator; inability to accept criticism; lack of loyalty to Kaiser; difficulties Parson might encounter with white subordinates; inability to take orders; and inability to plan well. R., Vol. II, 91-102, 104-116. Parson contests the validity of some of these statements, attacks others as clear indications that he was not promoted because of his activities in attempting to desegregate the plant facilities (he lacked "loyalty" to the company, criticized the company, and could not "get along" with people); and identifies others as pretexts for racial discrimination. While the District Court Judge clearly has the task of evaluating the credibility of conflicting evidence and witnesses subject to the clearly erroneous rule, e.g., *Volton* v. *Murray Envelope Corp.*, 5 Cir., 1974, 493 F.2d 191, 193-94, his failure to make any factual findings as to why Parson was not qualified for the position of foreman makes it impossible for the plaintiff to attack or for us to review the result under the proper standard.

evidence showing a marked disparity between the number of black hourly employees and the number of black foremen at the time he sought his promotion. The three black foremen employed at that time were restricted to the supervision of janitors, a situation that did not change until the next year. There is no mention of these figures in the District Court's findings or conclusions, leaving us with no assurance that the evidence was accorded the probative value it was due. Indeed, the Judge's statement that "other black men have been made foreman" indicates that he gave little, if any, weight to the evidence of statistical disparities. Moreover, the two individuals the Trial Court Judge identified as black supervisors were appointed in 1969 and 1973—long after Parson applied for and was denied a promotion.

Finally, we agree with Parson's contention that the District Court Judge erred in ignoring the impact of the procedure for awarding promotions that was in effect at the time Parson's application was denied. The Judge found that "[t]he process for the selection of a foreman . . . is untainted by any overtones of racial discrimination." However, the process described in the finding does not correspond to that in effect in 1966, but rather to the procedure as revised in 1972.[22] At the time Parson made his request,

[22] The District Court Judge found that:

> The process for the [selection of a foreman] by Kaiser is untainted by any overtones of racial discrimination. Although the post of foreman is not controlled by the Collective Bargaining Agreement, as vacancies occur they are posted on the plant bulletin board and any employee can initiate, on his own behalf, an application for consideration as foreman. All applications for foreman are considered by a review board. Individuals who have initiated an application are reviewed and evaluated by a Management Committee composed of: the Industrial Relations Superintendent, the Employee's Supervisor, the Departmental Supervisor where the vacancy exists, the plant manager or his designee, and a Black representative.

The procedure described here corresponds to that adopted by Kaiser in 1972.

Kaiser gave shift foremen veto power over any applicant; required each applicant to take two written tests; and specified no substantive criteria for guiding selections.[23] The

[23] Jim Cruse, Parson's general foreman, gave the following testimony as to the procedure followed in deciding Parson's request:

Q. Now, Parsons I take it discussed with you his, that is Parsons, becoming foreman during this period?

A. Right.

Q. When was the first time? I assume it was more than once.

A. Yes. We had several discussions. First time was—first part of June in 66. And one night, as I was leaving, he approached me and said he understood there was a policy on making foreman and he would like to apply for foreman job. . . . When he came back on the day shift Friday, we talked about it and I had been aware of the fact that there was a written policy on foreman selection which had been communicated to me, oh about a month before that.

Q. How long had there been a written policy for foreman?

A. I'd say a month or two.

Q. Prior to that, what was the procedure for becoming foreman?

A. It was essentially the same as what was in the written policy.

Q. What was that?

A. A recommendation was made by a shift foreman to a general foreman on a [man's] performance, or a man had an expressed interest on being foreman, he then made his recommendation to the general foreman and they would discuss and evaluate it and review it with the superintendent. . . .

Q. Alright. Now, you say you would discuss it with him when he came back on Friday?

A. Right. O.K. so I checked out the—I went back to the policy and reviewed it. And started off from the beginning, where we have the recommendation from the foreman and you get recommendations from previous foremen. . . . I told his foreman that Parsons had talked to me about it.

Q. Who was this?

A. Jim Saucier [Parson's shift foreman]. And that I wanted him to think about it and make a recommendation. . . . And the recommendation came in "no". [R. Vol. II., Doc. No. 52C at 11-15.]

procedure in effect at the time relevant to Parson's claim evidences many of the characteristics that we have long held violative of Title VII. In *Rowe* v. *General Motors Corp.* 5 Cir., 1972, 457 457 F.2d 348, 358-59, we found that the following aspects of a promotion procedure were invalid:

> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices.

These factors result in "procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman." They are therefore "a ready mechanism for discrimination against Blacks." *Id.*, at 359; *see also, Jenkins* v. *Caddo-Bossier Assoc. for Retarded Children,* 5 Cir., 1978, 570 F.2d 1227, at 1229; *Pettway* v. *American Cast Iron & Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 239-41. The District Court Judge clearly erred in judging Parson's individual claim as if his promotion request had been processed under a procedure adopted six years later. We remand for a reevaluation under the standards that existed in 1966.

B. Discrimination Against The Class: Promotions To Foreman

The District Judge found that:

> the evidence quite clearly demonstrated that blacks occupy many salaried positions at the Chalmette

> Works. There was no evidence indicating any present effects of any past discrimination which may have existed and the evidence relating to the selection process for foreman currently in operation at the Chalmette Works revealed no obstacles, overt or subtle, which prevent blacks from being promoted to the position of foreman. In fact, the very selection process that permits an individual to initiate his application for foreman and to be reviewed by a diversified Selection Committee contains appropriate safeguards to insure that blacks will be given consideration equal to that of whites.

On the basis of this finding, the Judge concluded that Kaiser had not discriminated against the class in the selection of foremen since the effective date of Title VII. In so holding, the Judge ignored the continuing effects of the pre-1972 procedures for the selection of foremen; ignored the statistics relied on by the plaintiff to document these effects; and ignored testimony as to individual instances of discrimination. The incorrect legal foundation for the Court's finding requires us to reverse and remand.

We have already described the procedures for selecting foremen at Kaiser and some of the similarities between the procedures used prior to 1972 and those condemned in *Rowe*. After the effective date of Title VII, Kaiser's method of selecting foremen granted veto power to immediate supervisors, provided hourly employees little information as to the necessary qualifications for promotion; provided those making the decisions no written standards or criteria for guidance; incorporated a personnel test since found discriminary in impact in a number of Title VII cases,[24] and provided insufficient safeguards for avoiding the influence of discrimination. In 1972, on "the eve of trial," *Rowe* v. *General Motors Corp.*, 457 F.2d at 359, Kaiser did alter its promotion procedures in ways that promise to mitigate the likelihood of discrimination. However, as we have noted before, "actions taken in the face of litigation are equivocal

[24] *See, e.g., Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Johnson* v. *Goodyear Tire and Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364.

in purpose, motive and permanence," *James* v. *Stockham Valves & Fittings Co.*, 5 Cir., 1977, 559 F.2d 310, 325 n.18, *cert. denied*, 1978, —— U.S. ——, 98 S.Ct. 767, 54 L.Ed.2d 781, quoting *Jenkins* v. *United Gas Corp.*, 5 Cir., 1968, 400 F.2d 28, 33, and do not redress the grievances of those injured by the previous practices.

While the 1972 revisions of the selection procedure are laudable, we do not find sufficient evidence in the record to convince us that these procedures are not discriminatory in operation, although fair in form. The record does not clearly describe the contents of the evaluation form used in the selection process,[25] and testimony as to weight accorded the

[25] The following testimony was given concerning the evaluation form:

> Q. (By Mr. Douglas) Is there some basis standard that governs your determination as to whether a man will or will not be made a foreman?
>
> A. I would have to say there are some basis considerations. It starts all the way from a man's absentee record, safety record, his quality to work as evidenced by either a lack or in fact proof of reprimand or counsellings due to poor workmanship or inability to get along with fellow workers or things of this nature. The individual's apparent ability to communicate or converse, be understood, his manner, his apparent desire to be foreman. . . .
>
> Q. Are these requirements documented anywhere?
>
> A. I believe there's a form that we check off which I think is available in personnel.
>
> Q. It's available to whom?
>
> A. To the members of the committee who are evaluating the individual.
>
> • • • • •
>
> Q. Are those the essential qualities that you would look for before you would endorse a man for the job of foreman?
>
> A. I'm trying to indicate here that leadership, which is hard to find, is involved in there, but it is pretty hard to define. But, yes, I believe those are the qualifications that I would look for. [R., Vol. VIII, Doc. No. 187 at 72-73, 76.]

different criteria specified indicates that they remain susceptible to the exercise of great discretion.[26] On remand, the District Court should determine whether the evaluation method places undue reliance on general character traits, such that complete subjectivity remains likely. See *Wade* v. *Mississippi Cooperative Extension Service*, N.D. Miss., 1974, 372 F.Supp. 126, *aff'd in relevant part*, 5 Cir., 1976, 528 F.2d 508.

The District Court's evaluation of the likelihood of injury suffered by members of the class of the pre-1972 promotion procedures was a finding that "blacks occupy many salaried positions" at the plant. This ignores the statistical context provided by the plaintiff. We have sketched the disparities between the numbers of black hourly and black salaried employees, and between black and white salaried employees.[27]

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[26] The following testimony was given concerning the weight given the constituent factors:

> Q. Is there any flexibility, or how is a man rated for example, on the chart? Is there a quality of points given?
>
> A. No, it isn't that statistically designed. It's a question of mostly yes or no type of questions.
>
> Q. Give me an example?
>
> A. Well, is there any evidence this individual has character stability, yes or no. Is he able to communicate properly, yes or no. This type of thing.
>
> Q. Is there any grade?
>
> A. One through ten, that type of thing?
>
> Q. Yes.
>
> A. No.
>
> Q. Is there a specific number of qualities that he must possess before he passes or fails?
>
> A. Not really. At the end of the form, which is really an interview form, you have a place where the consensus of the committee is should be considered or should not be considered. . . .
>
> [*Id.* at 80-81.]

[27] Plaintiff was unable to provide record data with which to estimate turnover among foremen after 1965. However, proof of turnover is not part of a prima facie case of discrimination. Rather, the defendant has the burden of proving a lack of turnover to justify a failure to hire minorities. *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 233.

The paucity of black foremen and the concentration of blacks in nonsalaried positions constitute a substantial statistical discrepancy that could alone establish a prima facie case of unlawful discrimination. *International Brotherhood of Teamsters* v. *United States*, 1977, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *James* v. *Stockham Valves & Fittings Co.*, 5 Cir., 1977, 559 F.2d 310, 329; *Wade* v. *Mississippi Cooperative Extension Service*, 5 Cir., 1972, 528 F.2d 508, 516-17; *United States* v. *Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 442, 446, *cert denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.[28] Moreover, the statistical patterns do not complete the plaintiff's case. In addition to Kaiser's use of invalid procedures through 1972, the acknowledged presence of pre-Act discrimination, and the statistical discrepancies, Parson presented testimony by individuals of their experiences under these procedures. As the Supreme Court *noted in Teamsters, supra*, 431 U.S. at 339, 97 S.Ct. at 1856, "The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."[29]

We conclude that the plaintiff's evidence of racial disparities in promotions to foreman after 1965, the exclusion of blacks from such positions prior to 1965, subjectively based promotion decisions by white supervisors after 1965, and the testimony by individual class members of discrimination they suffered, make a *prima facie* case of discriminatory

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[28] This Court has observed that the significance of statistical disparities between the races "is magnified when appraised in light of the fact that [the defendant's decision on promotions are] . . . almost exclusively a subjective determination made by white supervisors." *Bolton* v. *Murray Envelope Corp.*, 5 Cir., 1974, 493 F.2d 191, 195.

[29] *See, e.g.*, the testimony of Roosevelt Jackson, Ronald King, and Isadore Booker, concerning their attempts to secure promotions to supervisory positions. [R., Vol. VI, Vol. VII.]

practices in the selection of foremen. The District Court Judge erred in dismissing this aspect of plaintiff's case.[30] On remand, the "onus of going forward with the evidence and the burden of persuasion" is now on Kaiser. *James* v. *Stockham Valves & Fittings Co., supra,* 559 F.2d at 331; *United States* v. *Hayes International Corp.,* 5 Cir., 1972, 456 F.2d 112, 120.

C. Discrimination Against The Class: Interdepartmental Transfers

Plaintiff's appellate attack on the transfer system at the Chalmette plant is focused on the requirement that employees transferring to another department must enter at the lowest level job in the new department, with a likely accompanying reduction in pay.[31] The District Court Judge made the following findings as to the present system governing transfers:

> [T]his court finds that the seniority system employed by Kaiser does not "limit the employment and promotional opportunities of Negro employees" nor does

[30] Kaiser asserts that even if the plaintiff has established a prima facie case as to any claim, more is necessary to withstand a Rule 41(b) motion for involuntary dismissal. Under the standard urged, the trial judge should "evaluate the evidence without making special inferences in the Plaintiff's favor . . . and [should] resolve the case on the basis of preponderance of the evidence." *Emerson Electric Co.* v. *Farmer,* 5 Cir., 1970, 427 F.2d 1082, 1086.

We agree that Rule 41(b) allows a trial judge to make findings of fact at the close of a plaintiff's case. However, this does not respond to the flaw in the findings of fact before us here. Because the Judge applied incorrect legal principles, we are unable to credit the fact findings that were made. Kaiser's argument does not remove the necessity for a remand.

[31] Plaintiff relies on Kaiser's 1970 Seniority List, Plaintiff's Exhibit 19, to show examples of blacks who have high seniority in the nonproduction departments to which they were discriminatorily assigned during the 1950s. These employees hold jobs that pay at a higher rate and require less arduous manual labor than the entry jobs in the production departments.

Kaiser deny "Negro employees the same rights of transfer."

Although there was some testimony to the effect that blacks were excluded from some departments in the early 1950's, it was shown that by 1956, black employees had begun to transfer to almost every department at the Chalmette Works. There was also uncontroverted evidence that plant seniority was established for all purposes within the production departments by 1962 and that the same principle was applied in the craft departments by 1965. It was further shown that the seniority system in effect since 1962 allowed any employee to bid for a vacancy within his department on the basis of his total continuous plant seniority. It was further shown that, although there are lines of progression in the various departments, an employee is not required to bid up the line job by job, but rather he may bid to any job in the department for which there is a vacancy and in so doing may move around other employees who are junior to him by plant seniority. It was further shown that an employee wishing to transfer between departments, who is a successful bidder, enters the new department for a 10-day trial period and if he decides that he does not like the department or the job to which he has transferred, he has a right to return to his former job without losing any seniority. On the other hand, if he wishes to stay in the new department, after expiration of ten day period, the employee is free to bid on the basis of his qualifications and plant seniority on any vacancy in that department. The evidence established beyond a doubt that many black employees have taken advantage of these transfer opportunities and have rapidly advanced to higher paying jobs.

This Court finds that the method of transfer from department to department at the Chalmette Works does not discriminate against the class. This Court further finds that there is no loss in an employee's seniority as a result of his transferring between departments and that there is full plant seniority carryover on all such transfers. It should also be noted that a substantial number of black employees, who testified at the trial, had reached the top jobs in their respective departments prior to the passage of the Civil Rights Act of 1964. Such evidence clearly illustrates that the seniority system, as developed through the collective bargaining

> process, does not now nor did it historically exclude blacks or other employees from utilizing their plant seniority for transfer and promotion at the Chalmette Works.

The Judge's findings as to the role of plantwide seniority are not challenged here. We recognize that the relatively early adoption of plantwide seniority that is carried with an employee who transfers between departments places Kaiser's system above many that we have seen in this Court. *E. g., James* v. *Stockham Valves & Fitting Co.*, 5 Cir., 1977, 559 F.2d 310, 317. However, we do not believe that the trial judge adequately responded to the plaintiff's assertion that the ten-day bottom entry requirement hampered the advancement of black employees from the laborer positions to which past practices once restricted them. We therefore reverse and remand.

The difficulty with the bottom entry requirement is that the transferring employee must remain in the spare or lowest position for ten days *or* until a vacancy in a higher job becomes available. Such a vacancy may arise within twelve days after the transfer. The discriminatory vice rests in the danger that a vacancy may not arise for months, or even years. We have held that similar plans that restrict transfer to entry level jobs and limit advancement to upper level jobs to persons already in the department are invalid. See *United States* v. *Hayes International Corp.*, 5 Cir., 1972, 456 F.2d 112, 117. Such a system gives the old seniority criterion a continuing discriminatory effect; blacks are kept at a disadvantage begun by the past practices that kept them out of the nonlaborer departments. Because the ten-day period in the spare position is a minimum rather than a maximum requirement, it does not sufficiently distinguish Kaiser's system from those we have found defective. We hold that the District Court's finding is based on a mistaken understanding of what constitutes the "present effects of past discrimination," and cannot stand.

Kaiser and the Union attempted to justify the bottom entry requirement by arguing that it trains transferring

employees and allows them an opportunity to determine if they wish to remain in the new department. [R., Vol. IX, Doc. 191, at 113 (testimony of Kaiser's Industrial Relations Superintendent).] This argument invokes the so-called business necessity justification, which "except[s] those few employment practices, which are *non-intentionally* discriminatory or neutral, but perpetuate the consequences of past discrimination, because of their overriding business necessity." *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 244 [emphasis in original].[32] However, this doctrine is very narrow. A practice which is demonstrably discriminatory in impact must:

> not only *foster* safety and efficiency, but must be *essential* to that goal. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.'

Id., at n.87. In evaluating Kaiser's argument, the District Court Judge did not give sufficient consideration to whether the bottom entry requirement met this standard. On remand, this assessment must be made.

A Union is jointly liable with the employer for discrimination caused in whole or in part by the provisions of a collective bargaining agreement. *See Carey* v. *Greyhound Bus Co.*, 5 Cir., 1974, 500 F.2d 1372; *United States* v. *United States Steel Corp.*, 5 Cir., 1975, 520 F.2d 1043 *cert denied,* 1976, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77. The transfer and bidding policies that we find deficient were part of the Supplement Seniority Agreement between Kaiser and the

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[32] *See also, Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 431-32, S.Ct. 849, 28 L.Ed.2d 158; *Local 189, United Papermakers & Paperworkers* v. *United States*, 5 Cir., 1969, 416 F.2d 980, *cert. denied,* 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *United States* v. *Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 453, *cert. denied,* 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

Union. [Appendix, Vol. II, at 288-292.] As the representative of the black employees, the Union is charged with the duty of protecting them from invidious treatment. "[I]t would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party." *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1381. Any monetary liability imposed upon the employer must be shared by the Union. *See Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280; *United States* v. *United States Steel Corp.*, 5 Cir., 1975, 520 F.2d 1043; *Myers* v. *Gilman Paper Co.*, 5 Cir., 1977, 544 F.2d 837, *modified*, 556 F.2d 758, *cert dismissed*, —— U.S. ——, 98 S.Ct. 28, 54 L.Ed.2d 59.

D. Entry Into Craft Positions

After the plaintiff presented evidence as to the requirements conditioning entry to the crafts and the racial composition of the craft categories, the District Court found that: the testing procedures had been eliminated in 1968 and no evidence suggested "that but for the use of the tests prior to 1968, any member of the class would have obtained a higher paying position"; "the requirement that applicants for crafts positions possess some experience does not discriminate against the class"; and no evidence showed that Kaiser's "methods of training discriminated against the class." Because the District Court failed to consider critical aspects of plaintiff's evidence and applied incorrect legal principles, these findings must also be reversed.

The District Court Judge again appears to have ignored the statistical evidence. The plaintiff presented figures showing that in 1973, less than 3 percent of Kaiser's craftsmen were black. These numbers, when placed against the information as to the percentage and number of blacks among the hourly employees, are entitled to critical, if not dispositive weight, in assessing whether plaintiff has shown a prima facie case of discrimination. The plaintiff's argument is that these statistics demonstrate that Kaiser's practices with regard to selection of craftsmen contain elements of present discrimination and facially neutral policies that perpetuate past bias in hiring for craft positions.

Several of the incidents of past bias are recent—use of the Wonderlic Test through 1968, a written test until after 1968, and the requirement of a high school diploma. The practice challenged here is the requirement of prior industrial experience. Under Title VII, practices and procedures "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 430, 91 S.Ct. 879, 853, 28 L.Ed.2d 158. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*, 401 U.S. at 431, 91 S.Ct. at 853. The statistical evidence, with the testimony by individual members of the class as to obstacles they encountered in seeking entry to the crafts, requires the conclusion that the plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect. Kaiser therefore has the burden of showing that the prior experience requirement has "a manifest relationship" to the legitimate needs of the craft positions.[33] *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 432, 91 S.Ct. at 854; see also *United States* v. *Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418.

The plaintiff also challenged the District Court's dismissal of the claim of discrimination with regard to training programs for the crafts. At the time of trial, Kaiser imposed testing and educational requirements on applicants to the training programs, requirements which presumptively

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[33] An argument based on business necessity to validate the prior experience requirement in spite of different effects on blacks and whites must meet rigorous standards. See *Watkins* v. *Scott Paper Co.*, 5 Cir., 1976, 530 F.2d 1159, 1168, 1179-83, *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211.

account for the disparities between the number of black and white craft trainees. Again, this is sufficient to give Kaiser the burden of showing that these eligibility requirements are justified by the needs of the programs. *Pettway* v. *American Cast Iron Co., supra.* The District Court erred in dismissing this claim.

IV. Remedies

We have held that the District Court erred in dismissing the individual and class claims at the close of the plaintiff's case. On remand, the Trial Judge must determine the best method of completing the proceedings. However, the defendants should be allowed to present their evidence, and the District Court should give the plaintiff an opportunity to supplement the present record, in chief or by rebuttal, without being required to offer again the evidence already introduced.[34]

Because of the likelihood that practices may have altered since this case was first tried, and because the law has also changed, the District Court on remand must reexamine the evidence in light of the present law allocating burdens of proof in individual and class claims of employment discrimination in determining the existence of liability and the scope of necessary relief. However, the District Court must remain conscious that while Kaiser's recent affirmative action programs and modifications in past practices will clearly shape the nature of any prospective, injunctive relief,[35] they do not absolve Kaiser or the Union of liability

[34] For a general discussion on retrial after a reversal of a Rule 41(b) dismissal following the plaintiff's case-in-chief, see *Riegel Fiber Corp.* v. *Anderson Gin Co.*, 5 Cir., 1975, 512 F.2d 784, 793.

[35] In the recent case of *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 5 Cir., 1977, 563 F.2d 216, for example, this Court considered a 1974 plan altering Kaiser's entry requirements for craft training positions in an affirmative attempt to recruit blacks into the crafts. In that case, indeed, this Court found that Kaiser went too far in its efforts to increase the number of blacks in skilled positions, resulting in a plan that violated Title VII by imposing a hiring quota

for the injuries suffered by members of the class from the continuing impact of past discrimination. As we have clearly held, "[o]nce a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present." *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 252-53; *Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 413-425, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1380.[36]

Plaintiff also claims that the appropriate remedies for discrimination in transfers and promotions are those designed to place the black employee in the position he would have occupied but for the discrimination suffered—that is,

of a minimum number of blacks in a plant where no prior discrimination could be shown.

[36] *See Baxter* v. *Savannah Sugar Refining Corp.*, 5 Cir., 1974, 495 F.2d 437, 443-44, *cert. denied*, 1974, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308, for a description of the bifurcated burden of proof procedure followed in Title VII claims for class-wide back pay:

> [a] Title VII class action suit presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus [is] entitled to back pay or other appropriate relief.

See also Sagers v. *Yellow Freight System, Inc.*, 5 Cir., 1976, 529 F.2d 721, 734; *Sabala* v. *Western Gillette, Inc.*, 5 Cir., 1975, 516 F.2d 1251, 1255; *United States* v. *United States Steel Co.*, 5 Cir., 1975, 520 F.2d 1043, 1053-55.

his "rightful place."[37] We agree that this comports with the "make whole" approach of Title VII. Because of the early termination of the proceedings below, the District Court did not consider whether such remedies were necessary. On remand, the District Court is directed to consider the "rightful place" theory, particularly with regard to the plaintiff's complaint concerning the transfer system, in determining the need for and the scope of relief.

REVERSED and REMANDED.

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[37] Under that theory [rightful place theory] blacks are assured "the first opportunity to move into the next vacancies and positions which they would have occupied *but for* wrongful discrimination and which they are qualified to fill." *United States* v. *Georgia Power Co.*, 5 Cir., 1973, 474 F.2d 906. Thus blacks confined by discrimination to certain positions must be given the opportunity to transfer into the formerly "white" positions as vacancies occur in order to assume their "rightful place."

Pettway v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 248; *Sagers* v. *Yellow Freight System, Inc.*, 5 Cir., 1976, 529 F.2d 721, 730-31 (to be eligible for back pay there is no need for a class member to have previously applied for a transfer "to positions that [he] reasonably knew to have been closed to [the] class.").

APPENDIX D

HARRIS A. PARSON,
Plaintiff-Appellant,

v.

KAISER ALUMINUM & CHEMICAL CORP., AND LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Defendants-Appellees

No. 74-3468

United States Court of Appeals, Fifth Circuit
Nov. 1, 1978

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 10, 1978, 5 Cir., 575 F.2d 1374)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and MILLER,* Associate Judge.

PER CURIAM:

In their petitions for rehearing and rehearing en banc in this Title VII racial discrimination suit, the employer (Kaiser Aluminum & Chemical Corp.) and the union (Local 13000, United Steel Workers of America, AFL-CIO, CLC) assail the decision and opinion of the panel, 575 F.2d 1374, on a number of points. We fully adhere to our decision, but feel that clarification of our original opinion is desirable with respect to two of those points.

(1) Contrary to the assertion of Kaiser and the Union, we are fully aware that the decision of the Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 1977, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, holds that § 703 (h) of Title VII, 42 U.S.C. § 2000e-2(h), immunizes from liability even those seniority systems that

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* Associate Judge U.S. Court of Customs and Patent Appeals sitting by designation.

preserve the effects of past discrimination, so long as an intent to discriminate has not entered into their negotiation, genesis, or maintenance. *See* 431 U.S. at 353-56, 97 S.Ct. 1843; *see also Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir., 1978, 576 F.2d 1157, 1188-92; *James* v. *Stockham Valves & Fittings Co.*, 5 Cir., 1977, 559 F.2d 310, 349-52, *cert. denied*, 1978, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781. None of our findings that plaintiffs had established a *prima facie* case of illegal discrimination rested upon a theory of liability repudiated in *Teamsters*, although our discussion of the system of interdepartmental transfers established by the Kaiser-Union collective bargaining agreement, *see* 575 F.2d at 1387-89, might have been somewhat more explicit in this regard. We did, however, hold clearly and unmistakably that the central problem with the system of interdepartmental transfers was the ten-day bottom entry requirement, the result of which is that employees can use their plant seniority to bid for jobs in a new department only if they are willing to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten-day waiting period. While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is not immunized by § 703(h) and *Teamsters*. *Cf. Pettway, supra*, 576 F.2d at 1193-94.

(2) The Union objects to the suggestion in our original opinion, *see* 575 F.2d at 1389, that if upon remand the District Court finds the *prima facie* illegal transfer system to fail the "business necessity" justification, the Union must share liability for the Title VII violation and contribute to any monetary relief. Although our view is that the Union has a major operational responsibility for the transfer rules established by the collective bargaining

agreement, we have previously approached the attribution of liability and the apportionment of damages as between employer and union on a flexible basis with regard to the comparative equities, *see James, supra*, 559 F.2d at 353-54; *Guerra* v. *Manchester Terminal Corp.*, 5 Cir., 1974, 498 F.2d 641, 655-56; *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1381-82, and we do not mean to foreclose the District Court's discretion in this regard.

On remand, the District Court must of course be sensitive to the changes wrought in Title VII law—both with respect to liability and to the scope of relief—in the four years since this case was last before it. We particularly direct attention, in addition to our decision on appeal, to *Teamsters, supra; Franks* v. *Bowman Transp. Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444; *Pettway, supra;* and *James, supra*. But in the midst of jurisprudential change and complexity, the Court should not lose sight of its primary obligation, which is to ensure that the victims of illegal racial discrimination receive the full measure of relief to which the law entitles them.

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.

APPENDIX E

Supreme Court of the United States

No. A-657

LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Petitioner,

v.

HARRIS PARSON AND KAISER ALUMINUM & CHEMICAL CORP.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 31, 1979.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 22 day of January, 1979.